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May 24, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 9, 2004

Case No.: TIA-0133

XXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits, based on the employment of her late husband (the Worker). The Worker had been employed as a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination. The Applicant's son (the Appellant) filed an appeal with the DOE's Office of Hearings and Appeals (OHA). In his appeal, he stated that the Applicant had died and that he was pursuing the appeal. As explained below, we have concluded that the appeal should be denied.

*I. Background*

**A. The Energy Employees Occupational Illness Compensation Program Act**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's

employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Worker was employed as a laborer at the Savannah River Site (the site). The application states that he worked at the site for 36 years -- from 1951 to 1987. The Applicant requested physician panel review of one illness -- kidney problems.

The Physician Panel rendered a negative determination on the illness. The Panel stated that the claimed illness was end-stage renal disease and was not caused by toxic exposure. Instead, the Panel stated that the end-stage renal disease resulted from diabetes, high blood pressure and smoking. In support of its finding, the Panel discussed the Worker's medical records. The OWA accepted the Physician Panel's determination, and the Applicant filed the instant appeal.

In his appeal, the Applicant argues that the Worker was exposed to toxic substances during his work at the site.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

As an initial matter, we note that the Worker may have been exposed to toxic substances at the site. The Worker worked throughout the site as a laborer. OWA Record at 21, 22. The site profile lists toxins harmful to kidneys as present in many of the areas where the Worker was located. OWA Record at 88, 112. As explained below, however, the Worker's possible exposure to toxic substances does not indicate Panel error.

In general, we expect the Panel to address a worker's toxic exposures. However, in this case, it was not necessary to the logic of the Panel decision. The Panel found, based on the medical records, that the Worker's renal disease was a complication of his diabetes. The Applicant does not challenge the Panel's analysis of the Worker's medical records, and his mere disagreement with the Panel's medical opinion is not a basis for finding Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-133, be, and hereby is, denied.
- (2) The denial pertains only to the DOE claim and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 24, 2005